LIBRARY
SUPREME COURT U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 451

PENNSYLVANIA RAILROAD COMPANY,
PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITION FOR CERTIORARI FILED OCTOBER 2, 1959
CERTIORARI GRANTED DECEMBER 14, 1959

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 451

PENNSYLVANIA RAILROAD COMPANY,
PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

INDEX

	Original	Print
Proceedings in the United States Court of Claims		
Petition	1	1
Exhibit "A"—Difference between domestic and export rates on commercial prepaid shipments which were frustrated at the ports and reforwarded to other points	5	5
General traverse	9	8
Report of Commissioner, McMurray	11	8
Argument and submission of case (omitted in printing)	19	17
Order of the court suspending proceedings pending determination by Interstate Commerce Commission	21	17
Defendant's motion to vacate suspension of proceedings and for judgment	23	18
Exhibit to motion—Order of Interstate Commerce Commission denying petition for reconsideration	26	20
Exhibit to motion—Report of the Commission and order	27	21

RECORD PRESS, PRINTERS, NEW YORK, N. Y., FEBRUARY 25, 1960

	Original	Print
Proceedings in the United States Court of Claims —Continued		
Plaintiff's opposition to defendant's motion to vacate suspension of proceeding and for judgment	39	30
Plaintiff's motion to stay proceedings	41	31
Defendant's motion to dismiss and opposition to plaintiff's motion to stay proceedings	43	32
Exhibit to motion—Petition to enjoin, set aside and annul an order of the Interstate Commerce Commission in case of The Pennsylvania Railroad Company v. United States of America and Interstate Commerce Commission, Civil Action No. 26169 filed in the U.S. D.C. for the Eastern District of Pennsylvania	52	38
Plaintiff's memorandum in opposition to defendant's motion to dismiss and reply to the defendant's opposition to plaintiff's motion to stay proceedings	59	43
Plaintiff's reply to defendant's motion to vacate suspension of proceedings and for judgment	63	45
Order of the court granting defendant's motion to vacate suspension of proceedings and entering judgment	69	49
Clerk's certificate (omitted in printing)	71	50
Order extending time to file petition for writ of certiorari	72	50
Order allowing certiorari	73	51

[fol. 1]

IN THE UNITED STATES COURT OF CLAIMS

No. 50027

THE PENNSYLVANIA RAILROAD COMPANY, a Corporation,
Plaintiff,

v.

THE UNITED STATES, Defendant.

PETITION—Filed February 7, 1951

To the Honorable Judges of the Court of Claims:

The petition of The Pennsylvania Railroad Company, a corporation, respectfully shows:

I.

Plaintiff is a corporation engaged in interstate commerce as a common carrier of passengers and freight for hire, duly organized and existing under the laws of the Commonwealth of Pennsylvania.

[fol. 2]

II.

During the months of December, 1941, and January and September, 1942, plaintiff, at the request of the proper officers of the United States Government, transported under Government transportation requests between points within the United States, freight for the account of the United States Government.

III.

The freight charges in the amount of Twenty Thousand Two Hundred Five Dollars and Two Cents ($20,205.02) legally applicable to such transportation, based upon published tariffs lawfully on file with the Interstate Commerce Commission, were paid by the United States Government to the plaintiff, which, as the delivering carrier of all of

the said freight transportation, was and is the party entitled to receive payment of the charges for such transportation.

IV.

Notwithstanding the foregoing, the General Accounting Office, in March and June 1946 and January, June, July and November 1947, reduced the amount of the payment of such charges by deducting a portion thereof from certain other of plaintiff's bills then in the course of payment covering charges for other freight transportation acknowledged to be due and owing to the plaintiff by the United States Government.

V.

There is attached hereto and made a part hereof a statement marked "Exhibit A" showing in connection with such deducted freight charges the bill number, contract number, [fol. 3] point of origin, point of destination, waybill number, date, commodity, correct basis for freight charges, freight charges as paid, balance due, bill number from which deduction was made, date of deduction, and Government file number.

VI.

The freight charges represented by such deductions, totalling Seven Thousand Two Hundred Thirty Seven Dollars and Eighty-Seven Cents ($7,237.87), were and are legally due on said transportation, in accordance with published tariffs lawfully on file with the Interstate Commerce Commission, and plaintiff, therefore, is entitled to recover the total amount of Seven Thousand Two Hundred Thirty Seven Dollars and Eighty-Seven Cents ($7,237.87).

VII.

Plaintiff has made no assignment or transfer of its claim aforesaid, or any part thereof or interest therein, and is entitled to the full amount of said claim after making proper allowances for all just credits and set-offs.

Wherefore, plaintiff prays judgment in its favor against the United States in the amount of Seven Thousand Two Hundred Thirty Seven Dollars and Eighty-Seven Cents ($7,237.87).

The Pennsylvania Railroad Company, By P. D. Fox, Treasurer.

[fol. 4] *Duly sworn to by P. D. Fox, jurat omitted in printing.*

[fols. 5-6]

Exhibit "A" to Petition

(See Opposite) ☞

Ex. 4

THE PENNSYLVANIA RAILROAD COMPANY

DIFFERENCE BETWEEN DOMESTIC AND EXPORT RATES ON COMMERCIAL PREPAID SHIPMENTS WHICH WERE FRUSTRATED

Bill No.	Contract No.	Origin	Destination	W/B No.	Date	Commodity	Correct Basis Weight	Correct Basis Rate	Correct Basis Charges	Paid Weight	Paid Rate	Paid Charges	Balance Due Carriers
7-27-212060	DATPS 12183	Pencoyd, Pa.	New York, N. Y.	997802	9- 5-42	Steel Ingots	121380	4.08 G.T.	221.05	121380	2.45 G.T.	132.76	88.29
7-27-9600B	DATPS 4427	Butler, Pa.	New York, N. Y.	26263	4-29-42	Sheet Iron	105900	38	402.42	105900	24	254.16	148.26
7-27-9600B	DATPS 4427	Butler, Pa.	New York, N. Y.	26264	4-29-42	Sheet Iron	105480	38	400.82	105480	24	253.15	147.67
7-27-9600E	DATPS 13084	Munhall, Pa.	New York, N. Y.	901612	12-3-42	Tin Plate	102641	38	390.04	102641	24	246.34	143.70
7-27-212058	DATPS 12037	Sparrows Point, Md.	New York, N. Y.	218616	9-19-42	Billets	127700	4.26 G.T.	242.84	127700	2.68 G.T.	152.78	90.06
7-27-212058	DATPS 12037	Sparrows Point, Md.	New York, N. Y.	218614	9-19-42	Billets	127500	4.26 G.T.	242.46	127500	2.68 G.T.	152.54	89.92
7-27-212058	DATPS 12037	Sparrows Point, Md.	New York, N. Y.	218693	9-21-42	Billets	118500	4.26 G.T.	225.35	118500	2.68 G.T.	141.77	83.58
7-27-212058	DATPS 12037	Sparrows Point, Md.	New York, N. Y.	218698	9-21-42	Billets	152800	4.26 G.T.	290.57	152800	2.68 G.T.	182.81	107.76
7-27-212058	DATPS 12037	Sparrows Point, Md.	New York, N. Y.	218694	9-21-42	Billets	114800	4.26 G.T.	219.31	114800	2.68 G.T.	137.35	81.96
7-27-212058	DATPS 12037	Sparrows Point, Md.	New York, N. Y.	218687	9-21-42	Billets	122300	4.26 G.T.	232.57	122300	2.68 G.T.	146.32	86.25
7-27-212058	DATPS 12037	Sparrows Point, Md.	New York, N. Y.	218693	9-21-42	Billets	105400	4.26 G.T.	200.43	105400	2.68 G.T.	126.10	74.33
7-27-212058	DATPS 12037	Sparrows Point, Md.	New York, N. Y.	218685	9-21-42	Billets	116800	4.26 G.T.	222.11	116800	2.68 G.T.	139.74	82.37
7-27-212058	DATPS 12037	Sparrows Point, Md.	New York, N. Y.	218615	9-19-42	Billets	127600	4.26 G.T.	242.65	127600	2.68 G.T.	152.66	89.99
7-27-212058	DATPS 12037	Sparrows Point, Md.	New York, N. Y.	218697	9-21-42	Billets	155200	4.26 G.T.	295.14	155200	2.68 G.T.	185.68	109.46
7-27-212058	DATPS 12037	Sparrows Point, Md.	New York, N. Y.	218691	9-21-42	Billets	119300	4.26 G.T.	226.87	119300	2.68 G.T.	142.73	84.14
7-27-212058	DATPS 12037	Sparrows Point, Md.	New York, N. Y.	218686	9-21-42	Billets	151100	4.26 G.T.	287.34	151100	2.68 G.T.	180.78	106.56
7-27-212058	DATPS 12037	Sparrows Point, Md.	New York, N. Y.	218620	9-19-42	Billets	124000	4.26 G.T.	235.80	124000	2.68 G.T.	148.35	87.45
7-27-212058	DATPS 12037	Sparrows Point, Md.	New York, N. Y.	219618	9-19-42	Billets	129900	4.26 G.T.	247.02	129900	2.68 G.T.	155.41	91.61
7-27-212058	DATPS 12037	Sparrows Point, Md.	New York, N. Y.	218695	9-21-42	Billets	119900	4.26 G.T.	228.01	119900	2.68 G.T.	143.45	84.56
7-27-212058	DATPS 12037	Sparrows Point, Md.	New York, N. Y.	218699	9-21-42	Billets	122900	4.26 G.T.	233.71	122900	2.68 G.T.	147.04	86.67
7-27-212058	DATPS 12037	Sparrows Point, Md.	New York, N. Y.	218689	9-21-42	Billets	122400	4.26 G.T.	232.76	122400	2.68 G.T.	146.44	86.32
7-27-212058	DATPS 12037	Sparrows Point, Md.	New York, N. Y.	218690	9-21-42	Billets	122400	4.26 G.T.	232.76	122400	2.68 G.T.	146.44	86.32
7-27-212058	DATPS 12037	Sparrows Point, Md.	New York, N. Y.	218688	9-21-42	Billets	123300	4.26 G.T.	234.47	123300	2.68 G.T.	147.52	86.95
7-27-212058	DATPS 12037	Sparrows Point, Md.	New York, N. Y.	218617	9-19-42	Billets	130200	4.26 G.T.	247.60	130200	2.68 G.T.	155.77	91.83
7-27-212058	DATPS 12037	Sparrows Point, Md.	New York, N. Y.	218619	9-19-42	Billets	128600	4.26 G.T.	244.55	128600	2.68 G.T.	153.86	90.69
7-27-10090A	DATPS 986	Follansbee, W. Va.	New York, N. Y.	6254	12-15-41	Tin Plate	96600	36	347.76	96600	23	222.18	125.58
7-27-10090A	DATPS 986	Follansbee, W. Va.	New York, N. Y.	6255	12-15-41	Tin Plate	96600	36	347.76	96600	23	222.18	125.58
7-27-10090A	DATPS 986	Follansbee, W. Va.	New York, N. Y.	6325	12-16-41	Tin Plate	96600	36	347.76	96600	23	222.18	125.58
7-27-10090A	DATPS 986	Follansbee, W. Va.	New York, N. Y.	6472	12-18-41	Tin Plate	96600	36	347.76	96600	23	222.18	125.58
7-27-10090A	DATPS 986	Follansbee, W. Va.	New York, N. Y.	6473	12-18-41	Tin Plate	96600	36	347.76	96600	23	222.18	125.58
7-27-10090A	DATPS 986	Follansbee, W. Va.	New York, N. Y.	6662	12-22-41	Tin Plate	105000	36	378.00	105000	23	241.50	136.50
7-27-10090A	DATPS 986	Follansbee, W. Va.	New York, N. Y.	6663	12-22-41	Tin Plate	105000	36	378.00	105000	23	241.50	136.50
7-27-10090A	DATPS 986	Follansbee, W. Va.	New York, N. Y.	7005	12-29-41	Tin Plate	81900	36	294.84	81900	23	188.37	106.47
7-27-212056	DATPS 1505	Follansbee, W. Va.	New York, N. Y.	7249	1- 2-42	Tin Plate	102400	36	368.64	102400	23	235.52	133.12
7-27-212056	DATPS 1505	Follansbee, W. Va.	New York, N. Y.	7573	1- 8-42	Tin Plate	106960	36	385.06	106960	23	246.01	139.05
							Total Sheet No. 1		10021.99			6335.75	3686.24

EXHIBIT
Sheet 1

ILROAD COMPANY

TS WHICH WERE FRUSTRATED AT THE PORTS AND REFORWARDED TO OTHER POINTS

Paid Rate	Paid Charges	Balance Due Carriers	Deducted From Bill No.	Date of Deduction	Government File
2.45 G.T.	132.76	88.29	7-27-194141	7- 3-47	T-GAO-2526A-LOV-966673-15/44-GFA-7.27/D/11901
24	254.16	148.26	7-27-187113	1-20-47	T-GAO-2526A-ARG-1757769-3/44-GFA-7.27/9600B
24	253.15	147.67	7-27-187113	1-20-47	T-GAO-2526A-ARG-1757769-3/44-GFA-7.27/9600B
24	246.34	143.70	7-27-183856A	1-20-47	T-GAO-2526A-ARG-1758908-3/44-GFA-7.27/9600E
2.68 G.T.	152.78	90.06	7-27-171059	6-26-46	T-GAO-2526A-BHM-745770-10/43-GFA
2.68 G.T.	152.54	89.92	7-27-171059	6-26-46	T-GAO-2526A-BHM-745770-10/43-GFA
2.68 G.T.	141.77	83.58	7-27-171059	6-26-46	T-GAO-2526A-BHM-745770-10/43-GFA
2.68 G.T.	182.81	107.76	7-27-171059	6-26-46	T-GAO-2526A-BHM-745770-10/43-GFA
2.68 G.T.	137.35	81.96	7-27-171059	6-26-46	T-GAO-2526A-BHM-745770-10/43-GFA
2.68 G.T.	146.32	86.25	7-27-171059	6-26-46	T-GAO-2526A-BHM-745770-10/43-GFA
2.68 G.T.	126.10	74.33	7-27-171059	6-26-46	T-GAO-2526A-BHM-745770-10/43-GFA
2.68 G.T.	139.74	82.37	7-27-171059	6-26-46	T-GAO-2526A-BHM-745770-10/43-GFA
2.68 G.T.	152.66	89.99	7-27-171059	6-26-46	T-GAO-2526A-BHM-745770-10/43-GFA
2.68 G.T.	185.68	109.46	7-27-171059	6-26-46	T-GAO-2526A-BHM-745770-10/43-GFA
2.68 G.T.	142.73	84.14	7-27-171059	6-26-46	T-GAO-2526A-BHM-745770-10/43-GFA
2.68 G.T.	180.78	106.56	7-27-171059	6-26-46	T-GAO-2526A-BHM-745770-10/43-GFA
2.68 G.T.	148.35	87.45	7-27-171059	6-26-46	T-GAO-2526A-BHM-745770-10/43-GFA
2.68 G.T.	155.41	91.61	7-27-171059	6-26-46	T-GAO-2526A-BHM-745770-10/43-GFA
2.68 G.T.	143.45	84.56	7-27-171059	6-26-46	T-GAO-2526A-BHM-745770-10/43-GFA
2.68 G.T.	147.04	86.67	7-27-171059	6-26-46	T-GAO-2526A-BHM-745770-10/43-GFA
2.68 G.T.	146.44	86.32	7-27-171059	6-26-46	T-GAO-2526A-BHM-745770-10/43-GFA
2.68 G.T.	146.44	86.32	7-27-171059	6-26-46	T-GAO-2526A-BHM-745770-10/43-GFA
2.68 G.T.	147.52	86.95	7-27-171059	6-26-46	T-GAO-2526A-BHM-745770-10/43-GFA
2.68 G.T.	155.77	91.83	7-27-171059	6-26-46	T-GAO-2526A-BHM-745770-10/43-GFA
2.68 G.T.	153.86	90.69	7-27-171059	6-26-46	T-GAO-2526A-BHM-745770-10/43-GFA
23	222.18	125.58	7-27-194690	6-27-47	T-GAO-2526A-BLS-1349076-1/45-GFA-7/27/A10090
23	222.18	125.58	7-27-194690	6-27-47	T-GAO-2526A-BLS-1349076-1/45-GFA-7/27/A10090
23	222.18	125.58	7-27-194690	6-27-47	T-GAO-2526A-BLS-1349076-1/45-GFA-7/27/A10090
23	222.18	125.58	7-27-194690	6-27-47	T-GAO-2526A-BLS-1349076-1/45-GFA-7/27/A10090
23	222.18	125.58	7-27-194690	6-27-47	T-GAO-2526A-BLS-1349076-1/45-GFA-7/27/A10090
23	241.50	136.50	7-27-194690	6-27-47	T-GAO-2526A-BLS-1349076-1/45-GFA-7/27/A10090
23	241.50	136.50	7-27-194690	6-27-47	T-GAO-2526A-BLS-1349076-1/45-GFA-7/27/A10090
23	188.37	106.47	7-27-194690	6-27-47	T-GAO-2526A-BLS-1349076-1/45-GFA-7/27/A10090
23	235.52	133.12	8-219669	11-21-47	T-GAO-2526A-MIT-1349074-1/45-GFA-7.27/B10090
23	246.01	139.05	8-219669	11-21-47	T-GAO-2526A-MIT-1349074-1/45-GFA-7.27/B10090
	6335.75	3686.24			

THE PENNSYLVANIA RAILROAD COMPANY

DIFFERENCE BETWEEN DOMESTIC AND EXPORT RATES ON COMMERCIAL PREPAID SHIPMENTS WHICH WERE FRUSTRA

Bill No.	Contract No.	Origin	Destination	W/B No.	Date	Commodity	Correct Basis Weight	Correct Basis Rate	Correct Basis Charges	Paid Weight	Paid Rate	Paid Charges	Balance Carrier
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386688	9-21-42	Sheet Steel	59900	43	257.57	59900	28	167.72	89.85
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386538	9-16-42	Sheet Steel	60792	43	260.71	60792	28	170.22	90.49
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386718	9-22-42	Sheet Steel	60473	43	260.03	60473	28	169.32	90.71
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386720	9-22-42	Sheet Steel	60310	43	259.33	60310	28	168.87	90.46
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386504	9-15-42	Sheet Steel	60415	43	259.78	60415	28	169.16	90.62
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386768	9-24-42	Sheet Steel	59116	43	254.20	59116	28	165.52	88.68
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386769	9-24-42	Sheet Steel	58760	43	252.67	58760	28	164.53	88.14
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386767	9-24-42	Sheet Steel	59724	43	256.81	59724	28	167.23	89.58
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386719	9-22-42	Sheet Steel	60090	43	258.39	60090	28	168.25	90.14
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386641	9-19-42	Sheet Steel	59099	43	254.13	59099	28	165.48	88.65
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386685	9-21-42	Sheet Steel	60320	43	259.38	60320	28	168.90	90.48
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386575	9-17-42	Sheet Steel	48177	43	207.16	48177	28	134.90	72.26
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386455	9-14-42	Sheet Steel	60317	43	259.36	60377	28	168.89	90.47
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386939	9-19-42	Sheet Steel	60609	43	260.62	60609	28	169.71	90.91
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386577	9-17-42	Sheet Steel	60663	43	260.85	60663	28	169.86	90.99
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386607	9-18-42	Sheet Steel	58811	43	252.89	58811	28	164.67	88.22
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386457	9-14-42	Sheet Steel	60274	43	259.18	60274	28	168.77	90.41
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386539	9-16-42	Sheet Steel	60765	43	261.29	60765	28	170.14	91.15
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386458	9-14-42	Sheet Steel	60024	43	258.10	60024	28	168.07	90.03
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386609	9-18-42	Sheet Steel	59380	43	255.33	59380	28	166.26	89.07
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386456	9-14-42	Sheet Steel	59677	43	256.61	59677	28	167.08	89.53
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386537	9-16-42	Sheet Steel	60763	43	261.28	60763	28	170.14	91.14
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386605	9-18-42	Sheet Steel	44458	43	190.98	44458	28	124.48	66.50
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386505	9-15-42	Sheet Steel	60472	43	260.03	60472	28	169.32	90.71
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386606	9-18-42	Sheet Steel	59430	43	255.55	59430	28	166.40	89.15
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386378	9-11-42	Sheet Steel	57000	43	245.10	57000	28	159.60	85.50
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386374	9-11-42	Sheet Steel	59015	43	253.77	59015	28	165.24	88.53
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386404	9-12-42	Sheet Steel	59573	43	256.16	59573	28	166.80	89.36
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386403	9-12-42	Sheet Steel	59515	43	255.91	59515	28	166.64	89.27
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386401	9-12-42	Sheet Steel	59094	43	254.10	59094	28	165.46	88.64
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386540	9-16-42	Sheet Steel	60852	43	261.65	60852	28	170.39	91.26
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386686	9-21-42	Sheet Steel	59284	43	254.92	59284	28	166.00	88.92
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386687	9-21-42	Sheet Steel	60586	43	260.52	60586	28	169.64	90.88
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386740	9-23-42	Sheet Steel	58613	43	252.04	58613	28	164.12	87.92
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386640	9-19-42	Sheet Steel	82970	43	356.77	82970	28	232.32	124.45
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386741	9-23-42	Sheet Steel	58614	43	252.04	58614	28	164.12	87.92
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386376	9-11-42	Sheet Steel	53380	43	229.53	53380	28	149.46	80.07
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386377	9-11-42	Sheet Steel	59488	43	255.80	59488	28	166.57	89.23
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386375	9-11-42	Sheet Steel	53455	43	229.86	53455	28	149.67	80.19
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386337	9-10-42	Sheet Steel	54101	43	232.63	54101	28	151.48	81.15
							Total Sheet No. 2		10183.03			6631.40	3551.63

• Only $3549.63 deducted from Bill No. 7-27-152810 account $2.00 error in deduction.

RECAPITULATION

Sheet No. 1	10021.99		6335.75	3686.24
Sheet No. 2	10183.03		6631.40	3551.63
Total	20205.02		12967.15	7237.87

EXHIBIT A
Sheet 2

OAD COMPANY

WHICH WERE FRUSTRATED AT THE PORTS AND REFORWARDED TO OTHER POINTS

Paid Rate	Charges	Balance Due Carriers	Deducted From Bill No.	Date of Deduction	Government File
28	167.72	89.85	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	170.22	90.49	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	169.32	90.71	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	168.87	90.46	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	169.16	90.62	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	165.52	88.68	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	164.53	88.14	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	167.23	89.58	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	168.25	90.14	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	165.48	88.65	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	168.90	90.48	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	134.90	72.26	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	168.89	90.47	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	169.71	90.91	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	169.86	90.99	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	164.67	88.22	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	168.77	90.41	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	170.14	91.15	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	168.07	90.03	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	166.26	89.07	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	167.08	89.53	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	170.14	91.14	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	124.48	66.50	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	169.32	90.71	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	166.40	89.15	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	159.60	85.50	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	165.24	88.53	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	166.80	89.36	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	166.64	89.27	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	165.46	88.64	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	170.39	91.26	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	166.00	88.92	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	169.64	90.88	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	164.12	87.92	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	232.32	124.45	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	164.12	87.92	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	149.46	80.07	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	166.57	89.23	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	149.67	80.19	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	151.48	81.15	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
	6631.40	3551.63			

	6335.75	3686.24
	6631.40	3551.63
	12967.15	7237.87

[fol. 9]

IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

GENERAL TRAVERSE—Filed March 9, 1951

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Newell A. Clapp, Acting Assistant Attorney General.

GVP
JBM
Actg.

[fol. 10] [File endorsement omitted]

[fol. 11]

IN THE UNITED STATES COURT OF CLAIMS

No. 50027

THE PENNSYLVANIA RAILROAD COMPANY, a Corporation,

v.

THE UNITED STATES.

REPORT OF COMMISSIONER—Filed June 8, 1956

To the honorable the Chief Judge and Associate Judges of the United States Court of Claims:

Pursuant to the order of reference in the above-entitled case, the undersigned Commissioner makes the following report of his findings of fact:

1. Plaintiff is, and, at all times herein involved, was a corporation duly organized and existing under the laws of

the Commonwealth of Pennsylvania, engaged in interstate commerce as a common carrier by railroad.

2. During the period from December 15, 1941, to and including December 3, 1942, plaintiff transported the 75 carloads of iron and steel products involved in this action over its railroad lines from various steel mills to New York, New York, for exportation to Great Britain. The shipments moved on commercial bills of lading and the shipping charges were prepaid by the consignor on the basis of a tariff providing for an export rate from the point of origin to New York City. The bills of lading relating to the 75 carloads listed the following consignors and consignees:

40 shipments consigned by the Superior Sheet Steel Company at Canton, Ohio to the British Ministry of War Transport, Iron and Steel Division (hereafter designated B. M. W. T.) c/o War Forwarding Corporation, New York, New York;

21 shipments consigned by the Bethlehem Steel Company to the B. M. W. T., c/o War Forwarding Corporation, New York, New York;

10 shipments consigned by the Follansbee Steel Corp., Follansbee, West Virginia, to B. M. W. T., New York, New York;

[fol. 12] 2 shipments consigned by the American Rolling Mill Co., Butler, Pennsylvania to B. M. W. T., account U. S. Treasury Procurement Division, Iron and Steel Division, New York, New York:

1 shipment consigned by the United States Steel Export Company, Irvin, Pennsylvania to B. M. W. T., c/o War Forwarding Corporation, New York, New York; and

1 shipment consigned by the Carnegie, Illinois Steel Corp., Pencoyd, Pennsylvania to B. M. W. T., c/o War Forwarding Corporation, New York, New York.

All the shipments were marked for export. None of the bills mentioned the United States except the two from the Amer-

ican Rolling Mill Co. which were consigned to the "British Ministry of War Transport Account U. S. Treasury Procurement Division, Iron and Steel Division, New York, New York".

3. All of the iron and steel products involved in this action were manufactured by the consignors, pursuant to contracts with the Procurement Division of the United States Treasury Department. It was all intended for export to Great Britain as lend-lease material and was consigned for delivery to B. M. W. T. at New York City, an agency of the British Government, for shipment after the goods left the possession of the rail carrier. The procurement contracts provided for prepayment of the inland freight on the goods to New York as part of the consideration under the contracts. These contracts also contained the following provision:

> In the event shipment is made to other ports the unit price will be adjusted by the difference between the inland export freight rates to New York, N. Y., Philadelphia, Pa. or Baltimore, Md. and the applicable inland export freight rate to the other ports.

4. At a pre-trial conference it was agreed by plaintiff and defendant that title to the property, transported by the plaintiff railroad, passed to the defendant at the point of origin of the shipments, i.e. when the cargoes were delivered by the manufacturer to the railroad.

5. The War Forwarding Corporation, later dissolved, was a private corporation formed and organized under the laws of the State of New York. This corporation acted as a [fol. 13] freight forwarder for the British Ministry of War Transport (B. M. W. T.). At the request of the B. M. W. T. the War Forwarding Corporation would place shipping orders for iron and steel products with the Procurement Division of the United States Treasury Department. The shipping orders would show when and where the B. M. W. T. wished the goods to be shipped. The rail shipments were not ordered into New York until arrangements had been made for a convoy of ships to transport them to Great Britain.

The usual function of a freight forwarder in handling goods for export is to act as the agent of the consignee at the port. The War Forwarding Corporation was performing these services for the B. M. W. T. Each of the shipments was unloaded from the cars and placed in ground storage at Greenville Piers or Manhattan Piers, at which points the railroads maintained storage yards with lighterage facilities.

6. Because of (1) the activity of enemy submarines off the Atlantic Coast of the United States, or (2) other conditions brought about through the prosecution of the war, the movement of traffic was altered in the manner which would best utilize available ship tonnage or insure delivery by a safer route.

7. When, because of the conditions referred to in finding 6, it became necessary to forward shipments to other places for exportation, the B. M. W. T. gave the necessary orders to the War Forwarding Corporation which in turn relayed such orders to the railroad.

8. Twenty-one of the shipments were subsequently exported by rail to the Metal Reserve Company, c/o Steel Company of Canada, Hamilton, Ontario. The United States Government did not pay the freight charges on this movement. All of the freight charges were paid by the Steel Company of Canada. The remaining 54 shipments were transported by rail to other ports in the United States and were exported from such ports.

9. When it developed that a shipment could not be exported through the port of New York due to wartime conditions, the B. M. W. T. made the determination as to where the particular shipment should be forwarded to best serve [fol. 14] the interest of the British Government in fulfilling the reqirements needed to complete the British part of lend-lease.

10. One of the functions of the Office of Defense Transportation of the United States was to coordinate and direct the movement of traffic so as to prevent congestion. The Office of Defense Transportation advised the B. M. W. T.

through the War Forwarding Corporation when a particular port area was congested. The B. M. W. T. was guided by the information received from the Office of Defense Transportation in amending prior instructions relating to shipments into congested areas.

11. The Office of Defense Transportation controlled the movement of traffic by means of permits. Separate permits were issued for the shipments to and from New York. Permits were not issued until it was determined that a shipment could be handled and that shipping space was available at any particular port. Some of the shipments involved in this suit moved under such permits. Commercial bill of lading dated September 21, 1942, covering a carload of sheet steel from Canton, Ohio, shipped in car No. Wabash 83737, shows that permit No. QMR #PB 380127 was issued to cover the movement to New York. Government bill of lading No. DA-TPS 264244 covering a shipment of four carloads of sheet steel, including the above-mentioned inbound carload, from New York to San Francisco, California, shows that ODT Block Permit No. QMR. No. PI-430211 was issued to cover this movement.

12. After the shipments had been forwarded from New York to other points, plaintiff submitted supplemental bills to the Procurement Division, United States Treasury. These bills claimed additional transportation charges representing the difference between the export and domestic rates applicable on the shipments into New York. The bills were paid without question by the Treasury Department under authority of Section 322 of the Transportation Act of 1940.

13. No determination was made by the Procurement Division as to the correctness of the freight rates claimed in the supplemental bills, since the audit of the transportation charges was to be made by the General Accounting Office at a later date pursuant to the provisions of Section 322 of the Transportation Act of 1940.

[fol. 15] Subsequently, on the basis of an audit by the General Accounting Office, the amount of these additional charges was deducted from other bills (not in dispute) on the theory that the higher rate was not applicable or was

unreasonable. The present action was brought to recover the amount of these deductions.

14. The bills submitted by plaintiff for the difference in the domestic and the export rate on the shipments into New York were stamped and initialed with a certification as follows: "Certified correct and reasonable, War Forwarding Corporation, Iron and Steel Division, by R." On the back thereof was the following, apparently placed by a stamp:

> I certify that the service shown on this bill has been performed, that it was necessary and that the charge is proper.
>
> British Ministry of War Transport Per War Forwarding Corporation, Agents.

These statements were placed on the bills as a certification that the services had been performed and that the services were necessary. Any attempted approval of the correctness of the charges was obviously unauthorized since such function had been reserved to the General Accounting Office. There is no dispute on this point.

15. In procuring and financing material for lend-lease to Great Britain, money was allocated to the Procurement Division of the United States Treasury Department to obtain items which had no direct relationship to military or agricultural equipment. The iron and steel products involved in this suit came within that category. Contracts were let for the materials requisitioned and the funds allotted were used to pay for them. Where the procurement contracts required the manufacturer to prepay freight bills on the shipment of the materials to the port as part of the contract price, as was provided in the contracts involved in this suit, the Treasury Procurement Division would require the carrier to secure payment of such supplemental bills from the consignor.

16. The Finance Division, Treasury Procurement Office, had authority to pay bills in connection with lend-lease materials for Great Britain and did pay the transportation charges for such bills. When such bills were submitted there

[fol. 16] was provision for an examination of the bills in order to determine whether the goods were in fact for lend-lease purposes and whether the United States was the consignor and thus obligated to pay the shipping charges. When this fact was established, such bills were paid. The bills submitted and paid in the present suit for the supplemental charges, representing the difference between the domestic and export rate on the iron and steel products from the various places of manufacture to the New York port, contained no reference to a Government contract. It was the usual practice to refer the carriers involved in such bills to the consignors who were obligated to pay these shipping costs.

17. The cost of procuring lend-lease materials for Great Britain and the costs of handling such materials were charged in accounts to lend-lease allotments. Such lend-lease accounts with Great Britain have now been settled.

18. If the shipments had been exported from New York as originally consigned, the proper transportation charges for them from the points of origin to the New York port would have been on the basis of the export rates. The conditions in the export tariff were complied with up to the time of the diversion.

19. The practice of the plaintiff with respect to charges such as those here in dispute was to reserve all rights against the original shipper until the amount of the charges had been received from the United States. In some cases the plaintiff brought suit against the original shipper in order to protect the plaintiff from the expiration of the statute of limitations. Upon the payment of the charges by the United States, the suit against the original shipper was withdrawn.

20. The shipping charges as prepaid by the consignors included all necessary costs until the goods were to be turned over to the ocean carriers. At the time of the diversion they were in storage in possession of the carrier at Manhattan and Greenville piers at the New York port. If these goods had been exported as originally planned it would have been necessary for plaintiff to have performed

additional services in the movement of the goods to ship-side by lighterage or otherwise at no additional cost to the consignor or consignee above that represented by the prepaid bills except for applicable storage charges.

[fol. 17] The prepaid commercial bills of lading upon which these cargoes moved to the New York port contained expressions of release by the consignor in terms as follows or comparable thereto:

> Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:
>
> "The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges."

21. At the time the shipments here in question moved from the point of manufacture to the New York port, plaintiff was a party to Tariff 1895-C designated "Local, joint, proportional, coastwise, export and intercoastal freight tariff on iron and steel articles" applicable over routes in question. It allowed an export rate but upon a condition set out in Item 20 that such rates would apply only on shipments exported direct from railroad terminals to foreign countries. This tariff, which broadened the application of the rates, was amended effective December 28, 1942. It has been commonly referred to as the "frustrated freight tariff" since it permitted application of the export rates "on freight in carloads originating at points in continental United States or Dominion of Canada when consigned to a port in the United States for export which, after arrival at such port, due to the war emergency, is reshipped to another port for export or is reshipped to a point in the interior and there domesticated or again reshipped to a port for export." Other pertinent provisions of the tariff were:

> (d) Shipments consigned to a port for export which, after arrival at such port, are later shipped therefrom as new shipments to another port via a route via which

the through rate from point of origin to port through which the shipments actually are exported does apply:

Apply the export rate to the port to which originally consigned plus the export rate from such port to the port through which the shipment actually is exported, except that where shipments are stored at the port to which originally consigned under transit arrangements which authorize the protection of a through rate, such through rate will apply from the original point of shipment to the port through which the shipment actually is exported.

[fol. 18] (c) Shipments consigned to a port for export which, after arrival at such port, are later shipped therefrom as new shipments to the point of origin or any other point in the interior and there domesticated:

Apply the export rate to the port to which originally consigned plus the domestic rate from such port to the point in the interior, but not less than the domestic rate from the point of origin to the point in the interior at which the shipment is domesticated.

22. Prior to December 28, 1942, the export rate was uniformly held to be inapplicable to shipments of iron and steel articles which were not in fact exported from the originally intended port of exportation. All of the shipments involved in this action were made prior to December 28, 1942.

On December 28, 1942 Tariff F-1 (the so-called "frustrated freight tariff") became effective and created an exception permitting the application of the export tariff to shipments which were in fact exported but not from the originally intended port of exportation. By its own terms this tariff applied only to shipments taking place subsequent to its effective date.

23. The Treasury Department of the United States paid to plaintiff a total of $7,237.87 as supplemental freight charges on the iron and steel articles to the New York port, representing the difference between the amount prepaid on the basis of the export rate and the amount that would be due on the basis of the domestic rate. Subsequently, this

amount was deducted by the Finance Division of the Office of Treasury Procurement and by the General Accounting Office from moneys otherwise due plaintiff on other shipments. If the charges on the shipments involved in this suit from the points of manufacture to the New York port are properly computed on the basis of the export rate, plaintiff has been paid in full for such charges. If it is proper to compute such charges on the basis of the domestic rate, plaintiff is entitled to recover a total of $7,237.87.

Respectfully submitted.

Paul H. McMurray, Commissioner.

[fol. 19]

IN THE UNITED STATES COURT OF CLAIMS

ARGUMENT AND SUBMISSION OF CASE—January 16, 1957
(omitted in printing)

[fol. 21]

IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

ORDER OF THE COURT SUSPENDING PROCEEDINGS PENDING DETERMINATION BY INTERSTATE COMMERCE COMMISSION—April 3, 1957

This case comes before the court on the merits pursuant to the report of the commissioner and the briefs and argument of counsel. Upon consideration thereof,

It Is Ordered this third day of April, 1957, that further proceedings be and the same are suspended pending a determination by the Interstate Commerce Commission as to the proper charges to be applied to the shipments involved in this suit, the court having found that this case warrants such a procedure. *United States* v. *The Western Pacific Railroad Co., et al.*, No. 18, October 1956 Term, Supreme Court, decided December 3, 1956, and

It Is Further Ordered that a certified copy of this order, together with copies of the petition, answer and report of

the commissioner, be filed in the proceedings to be instituted before the Commission which proceedings are to be commenced by the defendant within sixty (60) days of this date.

By the Court

Marvin Jones, Chief Judge.

[fol. 23]

IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

DEFENDANT'S MOTION TO VACATE SUSPENSION OF PROCEEDINGS AND FOR JUDGMENT—Filed March 23, 1959

Defendant moves the Court for an order vacating the suspension of proceedings herein on April 3, 1957, and entering judgment for plaintiff in the amount of $1,663.39.

Attached hereto is a copy of the decision of Division 2 of the Interstate Commerce Commission, dated November 12, 1958, made pursuant to proceedings before the Commission in accordance with the Court's Order of Reference, dated April 3, 1957. Division 2 found that the proper charges to be applied to the shipment in suit were to be based on the export rate for 62 shipments and on the domestic rate for the remaining 13 shipments. Plaintiff was claiming that the domestic rates should be applied to each of the 75 shipments. Division 2 also ordered that the proceedings before the Interstate Commerce Commission be discontinued as per the order attached to the decision.

Plaintiff herein, thereafter filed a petition for reconsideration by the entire Commission of the report of Division 2 dated November 12, 1958. Attached hereto is a copy of the Interstate Commerce Commission's order of March 4, 1959, denying plaintiff's petition for reconsideration.

[fol. 24] In respect to the 13 shipments on which the Commission found that the freight charges should be based upon the domestic rate, plaintiff's petition filed herein and defendant's statement filed with the Interstate Commerce Commission both indicate that plaintiff is due the amounts listed below for each of the shipments if it is found that the freight charges should be based upon the domestic rate.

Plaintiff's Bill No.	From	Waybill Number	Car Number	Amount Due
7-27-9600B	Butler, Pa.	26263	BLE-36251	$ 148.26
7-27-9600B	Butler, Pa.	26264	MP-72565	147.67
7-27-A10090	Follansbee, W. Va.	6254	PRR-510910	125.58
7-27-A10090	Follansbee, W. Va.	6255	PRR-41111	125.58
7-27-A10090	Follansbee, W. Va.	6472	BH-71550	125.58
7-27-A10090	Follansbee, W. Va.	6663	C&O-1245	136.50
7-27-A10090	Follansbee, W. Va.	6662	PRR-49907	136.50
7-27-A10090	Follansbee, W. Va.	6325	PRR-596909	125.58
7-27-A10090	Follansbee, W. Va.	7005	C&O-85430	106.47
7-27-A10090	Follansbee, W. Va.	6473	PRR-121117	125.58
7-27-B10090	Follansbee, W. Va.	7573	SAL-17282	139.05
7-27-B10090	Follansbee, W. Va.	7249	PRR-35200	133.12
9-27-57863	Canton, Ohio	386701	RI-142881	87.92
			Total	$1,663.39

Defendant concedes that plaintiff is due said amount of $1,663.39 for the above listed shipments. Defendant alleges that plaintiff is due nothing for the other 62 shipments, since the Commission found that the charges thereon should be based upon the export rate.

In view of the foregoing, it is respectfully submitted the proceedings before this Court be reactivated, by vacating [fol. 25] the Court's Order of Suspension dated April 3, 1957, and that judgment be entered for plaintiff against defendant in the sum of $1,663.39.

Respectfully submitted,

George Cochran Doub, Assistant Attorney General, Civil Division.

Paris T. Houston, Lewis A. Dille, Attorneys, Civil Division, Department of Justice.

[fol. 26]

EXHIBIT TO MOTION

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 4th day of March, A.D., 1959.

No. 32187

UNITED STATES OF AMERICA

v.

PENNSYLVANIA RAILROAD COMPANY

Upon consideration of the record in the above-entitled proceeding, petition of The Pennsylvania Railroad Company, defendant, for reconsideration, and reply by the United States of America.

It is ordered, That the petition be, and it is hereby, denied, for the reason that the findings and conclusions in the report of the Commission, Division 2, decided November 12, 1958, are fully supported by the evidence of record, and the matters submitted in support of the petition do not present substantial and material grounds to warrant reopening the proceeding for further reconsideration.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

[fol. 27]

EXHIBIT TO MOTION

INTERSTATE COMMERCE COMMISSION

No. 32187

UNITED STATES OF AMERICA

v.

PENNSYLVANIA RAILROAD COMPANY

Decided November 12, 1958.

Just and reasonable charges on 75 carloads of iron and steel articles, steel ingots, and billets shipped from origins in Ohio, Pennsylvania, West Virginia, and Maryland to New York, N. Y., during 1941 and 1942, for export, but not exported through that port because of war conditions, determined. Proceeding discontinued.

George Cochran Doub, *Lewis A. Dille*, and *Paris T. Houston* for complainant.

J. C. Kenney for the Department of the Army.

William F. Zearfaus and *Paul F. McArdle* for defendant.

REPORT OF THE COMMISSION

DIVISION 2, COMMISSIONERS WINCHELL, MURPHY, AND GOFF

BY DIVISION 2:

The modified procedure was followed. Oral hearing was held to permit the parties to examine certain witnesses with respect to matter introduced under the modified procedure, and for the introduction of additional evidence. Exceptions to the examiner's proposed report were filed by the defendant, and the complainant replied. Exceptions and requested findings not specifically discussed in this re-

port nor reflected in our findings or conclusions have been considered and found not justified.

A petition by the defendant that we require certain witnesses to produce underlying data and documentary evidence relating to certain assertions made in the complainant's statement of facts and argument was denied by the [fol. 28] Commission, as was a request by the defendant for oral argument. The defendant has filed a petition for reconsideration of the order denying its request for oral argument. No error in the order of denial is specified, nor is it shown that any substantial purpose would be served by granting oral argument. Accordingly, the petition is denied.

By petition filed on May 28, 1957, as amended, the complainant requests a finding that the charges sought to be collected by the defendant on 75 carloads of iron and steel articles, billets, and steel ingots, on the basis of the applicable domestic rates,[1] are unjust and unreasonable, and that the just and reasonable charges are those originally collected based on the corresponding export rates. The considered shipments moved from origins in Ohio, Pennsylvania, West Virginia, and Maryland, to the port of New York, N. Y., during the period December 1941 through November 1942, for exportation to Great Britain. However, because of war conditions, the shipments were not exported through that port, but were later exported through other ports and to Canada. The instant petition was filed pursuant to an order of the United States Court of Claims, dated April 3, 1957, in which the Court instructed the complainant, defendant in a proceeding pending before the Court, to institute this proceeding in order to obtain a determination by this Commission of the "proper charges to be applied to the shipments involved in this suit", the 75 shipments here considered. The defendant herein instituted the proceeding before the Court of Claims for judgment in the amount of the difference between the charges col- [fol. 29] lected and charges based on the applicable domestic rates. The court proceeding is being held in abeyance pending our determination herein.

---

[1] Rates are stated per 100 pounds, except where otherwise indicated.

The shipments moved on commercial bills of lading which clearly indicated that the ladings were intended for export. Charges were prepaid by the shippers at the export rates. On 40 shipments of sheet steel originating at Canton, Ohio, in September 1942, the export rate charged was 28 cents; the corresponding domestic rate was 43 cents. On 21 shipments of billets from Sparrows Point, Md., in September 1942, the export and domestic rates were, respectively, $2.68 and $4.26 a gross ton, and on 10 shipments of tin plate from Follansbee, W. Va., during December 1941 and early January 1942, they were 23 cents and 36 cents. On 2 shipments of sheet iron from Butler, Pa., in April 1942, a shipment of steel ingots from Pencoyd, Pa., in September 1942, and a shipment of tin plate from Munhall (Irvin), Pa., in November 1942, the export rates charged were 24 cents, $2.45 a gross ton, and 24 cents, and the corresponding domestic rates were 38 cents, $4.08 a gross ton, and 38 cents.

Upon arrival at New York, the shipments were unloaded and placed in ground storage at Greenville piers or Manhattan Piers, which are railroad storage yards with lighterage facilities. Due to the activity of enemy submarines off the Atlantic coast and other conditions incident to the prosecution of the war, there was a lack of available shipping space and the shipments could not be loaded aboard vessels at New York for overseas destinations. Subsequently, 21 of the shipments were forwarded by rail to Hamilton, Ontario, Canada. The remaining 54 shipments were later transported from New York by rail and exported from other ports. All were eventually exported from west coast ports, except two of the shipments which respectively [fol. 30] moved through New Orleans, La., and Baltimore, Md. The rail charges from New York on the shipments are not at issue here.

The tariff in which the export rates were published contained a provision that such rates would apply only if traffic moving thereunder did not leave the possession of the carrier at the port to which initially consigned. The shipments were not exported through the port of New York, and did ultimately leave the possession of the originating carrier prior to exportation. Thus, the conditions of the tariff rule were not fully complied with, and the export

rates were not applicable on these shipments to New York. The complainant concedes that the domestic rates charged were applicable.

After the shipments had been forwarded from New York, the defendant submitted to the Government supplemental bills for additional freight charges based upon the difference between the export and domestic rates applicable to the shipments to New York. These bills were paid without question, but upon further audit the amounts claimed were deducted from other amounts due the defendant.

Effective December 28, 1942, after these shipments had moved, the defendant established what is commonly known as its "frustrated freight tariff", containing rules governing the application of rates on shipments consigned to a port for export which, after arrival at the port, owing to the war emergency, were reshipped as new shipments to another port. They provided that if the traffic were reshipped to another port for export over a route over which the through rate from the point of origin to the port through which the shipments actually are exported did not apply, the export rate to the port originally consigned, plus [fol. 31] the export rate from that port to the port through which the shipments were actually exported, would apply.

The complainant relies principally upon the following: (1) the shipments were marked "for export" and were consigned to the British Ministry of War Transport; (2) on at least 62 of the shipments arrangements for vessel space were made prior to shipments; (3) each shipment was in continuous possession of the carrier until forwarded from New York by rail; (4) all conditions of the export tariff were complied with except actual delivery to shipside at New York; (5) failure to export through the port of New York was due to conditions beyond the control of the parties; and (6) the export tariff was amended shortly after the shipments moved so that shipments moving under like circumstances thereafter were accorded the export rates.

During the period of movement of most of these shipments, the Office of Defense Transportation was charged with the responsibility of governing the movement of traffic to the ports with a view to preventing congestion and

insuring the free movement thereto of war materials. Its general order O.D.T. 16, issued July 6, 1942, provided, among other things, that shipments to ports could be made only after issuance by that agency of a permit called "O.D.T. block permit." Such a permit was issued covering a specified shipment only when definite cargo space at the port was then available or sufficient assurances were received by O.D.T. officials that cargo space would be available within a reasonable time after the arrival of the freight at the port. The shipping papers were required to make reference to such a permit by number, and the [fol. 32] bills of lading covering 62 carloads bore the notation "O.D.T. block permit" with appropriate numbers. Twelve shipments moved prior to the issuance of the general order and necessarily show no reference to such a permit. The bill of lading covering one carload of sheet steel shipped on September 23, 1942, from Canton also failed to show such permit information. Although the complainant contends that cargo space had been arranged prior to shipment for all 75 carloads, there is no factual evidence of record to substantiate such a contention as to the aforementioned 13 shipments.

The defendant argues that the record does not substantiate the claim that the cargo reservation was made on any of the 75 shipments. It asserts that the mere showing of the O.D.T. permit number on the bill of lading does not constitute sufficient evidence that cargo space was reserved. It emphasizes that general order O.D.T. 16 permitted the issuance of an "O.D.T. block permit" in circumstances where it was found that cargo space would be available within a reasonable time after the arrival of the freight, and contends that it should be afforded an opportunity to determine whether those responsible for issuing the permits did so on the chance that space would be available but without definite knowledge of the fact. It renews its exception, made at the oral hearing, to the Commission's denial of its request that witnesses testifying as to the circumstances surrounding the issuance of such permits be required to produce the underlying data upon which their conclusions are based. That request was denied on the ground that, among other things, any documents produced would be in

substantiation of evidence previously submitted by the complainant, and any insufficiency of such evidence may prop- [fol. 33] erly be determined after cross-examination of witnesses. These witnesses testified, on cross-examination, that prior reservation of cargo space was a condition precedent to the issuance of a permit and that the permits here in question were issued in the regular course of business. The defendant produced no evidence to the contrary. In our opinion, the notations appearing on the bills of lading, together with the oral and written testimony of the complainant's witness with respect thereto, sufficiently establish that cargo space had been arranged prior to the movement of 62 of the shipments.

The question of the proper charges on "frustrated shipments" such as those here considered, has been before this Commission for determination in a number of proceedings cited by the parties. In some cases, the charges at the domestic rates were found unjust and unreasonable, while in others the requests for relief were denied. In some of the cases cited an award of reparation was unopposed by the carriers. The decision in each proceeding was made upon the facts and circumstances surrounding the specific movements. A prime factor for consideration in complaints involving shipments of "frustrated freight" is whether vessel space was reserved prior to shipment. This tends to indicate whether or not due diligence was exhibited on the part of the shippers to avoid noncompliance with the provisions of the export tariff. The defendant, however, submits that the theory of diligence or lack of diligence in arranging for vessel space is far outweighed by other considerations incident to the rates here under attack. The record does not substantiate this view.

In *Pacific Chemical & Fertilizer Co.* v. *Pennsylvania R. Co.*, 268 I.C.C. 468, decided May 21, 1947, the Commission [fol. 34] found that the complainant failed to exercise due diligence in arranging for the delivery and ocean transportation of its shipments, thereby precluding an award of reparation to the basis of the export rates. It viewed the findings in a number of proceedings on this subject which are pertinent here, stating, at pages 471-472:

In *California Texas Oil Co.* v. *Bessemer & L.E.R. Co.*, 264 I.C.C. 147, division 3 found that domestic rates applicable on exported traffic, because it had left the possession of the carrier in circumstances like those which affected the shipments under consideration, were not shown to have been unreasonable. The division said at page 149:

> Division 2 in *C.B. Fox Co.* v. *Gulf M. & O.R. Co.*, 246 I.C.C. 561, *River Petroleum Corp.* v. *Yazoo & M. V. R. Co.*, 258 I.C.C. 1, and *Mid-Continent Petroleum Corp. v. Illinois Central R. Co.*, 258 I.C.C. 422, found that charges higher than those based on coastwise or export rates on shipments which could not be exported or moved coastwise because of war conditions, were unreasonable under circumstances shown. When the shipments involved in the instant proceeding were forwarded from origins the complainants were aware of the war conditions affecting exportations from New York; yet they made no prior arrangements for vessel space for transshipment beyond that port. In short, they were willing to take a chance of obtaining the necessary vessel space. The situation in this respect is no different from that disclosed in a similar proceeding, *Haulon-Buchanan, Inc.* v. *Burlington-R. I. R. Co.*, 258 I.C.C. 519, the dismissal of which by the Commission was affirmed in its report on further hearing, 263 I.C.C. 603, decided October 2, 1945. There, the Commission accorded substantial and apparently controlling weight to the fact that the complainant made no prior arrangement for vessel space. See also the report of Division 3 in *America Republics Corp.* v. *Wichita Falls & S. R. Co.*, 259 I.C.C. 605, dismissing a similar complaint. A petition subsequently filed by complainant in that proceeding for reconsideration was denied by the Commission. Moreover, in neither of those proceedings did the fact of subsequent modification of the restrictive provisions affecting the application of export rates to so-called "frustrated" shipments influence the decisions therein.

In the second report in *Hanlon-Buchanan, Inc.* v. *Burlington-Rock Island R. Co.*, 263 I.C.C. 603, the Commission discussed the proceeding referred to in the quotation above and as to the three decisions by division 2, said, at page 605:

> [fol. 35] In each of those proceedings the complainants exercised diligence in arranging for sale of the commodities shipped and for the vessel space prior to shipment from origins, and the failure of the traffic to move in export or coastwise commerce from the ports was due to causes beyond their control.

The foregoing discussion is applicable to the facts before us in this proceeding.

The domestic rates sought to be charged on these shipments, other than the 21 shipments of billets and the one shipment of steel ingots, are on the basis of the distance scale of maximum reasonable rates prescribed by the Commission for application within official territory on iron and steel articles in *Iron and Steel Articles*, 155 I.C.C. 517, plus subsequent general increases. The defendant claims the benefit of the well-known principle laid down by the United States Supreme Court in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370, to the extent that the domestic rates included amounts prescribed by the Commission. In that proceeding, the Court held that where the Commission has, upon complaint and after hearing, declared what is the maximum reasonable rate to be charged by a carrier, it may not at a later time, by declaring its own prior finding as to reasonableness to be erroneous, subject a carrier which has conformed thereto to the payment of reparation measured by what the Commission at such later time declares it should have decided in the earlier proceedings to be a reasonable rate. The defendant urges that the Commission-prescribed rates sought to be collected cannot be found to be unlawful, and contends that charges computed on such basis thus are the "proper charges" on the considered shipments.

In the case cited, the Supreme Court stated, on page 391, that the " . . . case turns upon the power of the Interstate [fol. 36] Commerce Commission to award reparations with respect to shipments which moved under rates approved or prescribed by it." In the instant proceeding, no reparation is sought and none will here be awarded. The complainant does not assail the reasonableness of the domestic rate, as such, but alleges that charges based thereon, in view of the fact that the shipments ultimately were exported and of the extraordinary circumstances shown in connection therewith, were unjust and unreasonable to the extent that they exceeded those based on the export rates from and to the same points. We find that the defendant's contention in this respect is without merit. Under somewhat similar circumstances, a like finding was made by division 3 in *Standard Oil Co. of New Jersey* v. *Pittsburgh & L. E. R. Co.*, 259 I.C.C. 793, 797.

We find that on 62 of the shipments here concerned; that is, 39 carloads of sheet steel shipped from Canton, 21 carloads of billets shipped from Sparrows Point, 1 carload of steel ingots shipped from Pencoyd, and 1 carload of tin plate from Munhall, the charges based on the domestic rates were unjust and unreasonable to the extent that they exceeded charges based on the rates contemporaneously maintained on export shipments from and to the same points. We further find that just and reasonable charges on the remaining 13 shipments; that is, 10 carloads of tin plate from Follansbee, 2 carloads of sheet iron or steel from Butler, and 1 carload (RI 142881) of sheet steel from Canton, are those sought to be collected on the basis of the domestic rates.

An order will be entered discontinuing the proceeding.

[fol. 37] ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D. C. on the 12th day of November, A. D. 1958.

No. 32187

UNITED STATES OF AMERICA

v.

PENNSYLVANIA RAILROAD COMPANY

This proceeding being at issue upon a petition of referral from the United States Court of Claims and a reply thereto, and having been duly submitted by the parties, and full investigation of the matters and things involved having been made, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission, division 2.

Harold D. McCoy, Secretary.

(Seal)

[fol. 39]

IN THE UNITED STATES COURT OF CLAIMS

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO VACATE SUSPENSION OF PROCEEDINGS AND FOR JUDGMENT—Filed April 3, 1959

Plaintiff opposes the Defendant's Motion to Vacate Suspension of Proceedings and For Judgment and adopts as reasons therefor its Motion to Stay the Proceedings filed this 3rd day of April, 1959.

Respectfully submitted,

Paul F. McArdle, 701 Union Trust Building, Washington 5, D. C., Attorney for Plaintiff.

[fol. 41]

IN THE UNITED STATES COURT OF CLAIMS

PLAINTIFF'S MOTION TO STAY PROCEEDINGS—
Filed April 3, 1959

Comes now the Plaintiff, through its attorney, and moves this Court for an order to stay the above proceedings and as reason therefor states as follows:

1. Plaintiff, The Pennsylvania Railroad Company, is preparing a complaint to be filed in the appropriate Federal Court to enjoin, set aside and annul the order of the Interstate Commerce Commission dated March 4, 1959.

2. The above matter was referred to the Interstate Commerce Commission and the issues were considered by the Interstate Commerce Commission in its docket No. 32187. Copies of the order of the Interstate Commerce Commission are attached to defendant's motion to vacate suspension of proceedings and for judgment.

3. Plaintiff respectfully requests that this motion be granted until a final decision is rendered on the complaint to enjoin, set aside, and annul the order of the Interstate Commerce Commission.

Respectfully submitted,

Paul F. McArdle, 701 Union Trust Building, Washington 5, D. C., Attorney for Plaintiff.

Denied: plaintiff is to file within 15 days hereof its response if any to defendant's motion to vacate suspension of proceedings and for judgment filed March 23, 1959; May 13, 1959. M.J.

[fol. 43]

IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

DEFENDANT'S MOTION TO DISMISS AND OPPOSITION TO PLAINTIFF'S MOTION TO STAY PROCEEDINGS—
Filed April 13, 1959

Defendant moves the Court to dismiss plaintiff's petition herein, pursuant to the provisions of Title 28, U. S. Code, Section 1500, for the reason that plaintiff has filed a petition in a United States District Court seeking adjudication of the matters involved in the present suit and thereby depriving this Court of jurisdiction. Defendant also opposes plaintiff's motion to stay proceedings filed herein on April 3, 1959.

[fol. 44]

MEMORANDUM IN SUPPORT OF MOTION AND OPPOSITION

1

Plaintiff Has Voluntarily Deprived the Court of Jurisdiction.

Plaintiff requests the Court to stay proceedings for the reason that it is preparing a complaint to be filed in the appropriate Federal Court to enjoin, set aside and annul the order of the Interstate Commerce Commission dated March 4, 1959.

Plaintiff has now filed such petition in the United States District Court for the Eastern District of Pennsylvania, entitled "The Pennsylvania Railroad Company, Petitioner v. United States of America and Interstate Commerce Commission, Civil Action No. 26169." A copy thereof is attached hereto as an appendix. The appendices to plaintiff's petition have been previously furnished the Court with defendant's motion to vacate stay of proceedings and enter judgment, and are not reproduced herewith.

The Act of June 25, 1948, 62 Stat. 942, Title 28, U.S.C., Section 1500, reads as follows:

§ 1500. Pendency of claims in other courts.

The Court of Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States. (June 24, 1948, ch. 646, § 1, 62 Stat. 942.)

[fol. 45] The basic issue involved in the present suit revolved around the question of whether the domestic rates asserted by plaintiff on the shipments to New York, which were intended for export, were reasonable in view of the fact that the exportation of the goods was frustrated through no fault of the parties. The Interstate Commerce Commission had ruled on this question several times and defendant contended that, from such rulings, this Court could decide the question in this case without further reference to the Commission. However, the question of reasonableness of rates is always one found to be within the primary jurisdiction of the Commission and, therefore, the Court suspended further proceedings in the case until an advisory opinion from the Commission was received. That opinion was rendered and was supplied to this Court, along with defendant's motion to vacate the previous order of suspension and to enter judgment in accordance with the Commission's findings.

The advisory opinion of the Interstate Commerce Commission, which is the subject of plaintiff's attack in the District Court action, is an advisory opinion rendered for this Court in connection with the litigation of the issues involved in the present suit. Plaintiff seeks a determination of a District Court on an issue that is for determination by this Court. The Commission's advisory opinion, for all practical purposes, determines the outcome of the present suit. If it can be said that this Court is without jurisdiction to make this determination after securing an advisory opinion from the Interstate Commerce Com-

[fol. 46] mission, then the Court is without jurisdiction of the suit in the first instance and plaintiff's petition should be dismissed. If this Court did have jurisdiction of this suit in the first instance, it now has lost it by reason of plaintiff's action. See: *National Cored Forgings Co.* v. *United States*, 132 C. Cls. 11; *Maguire Industries* v. *United States*, 114 C. Cls. 687.

In taking the matter to the District Court, plaintiff has voluntarily nonsuited itself in this Court by depriving this Court of jurisdiction over the claims involved in this suit.

2

Further Stay of Proceedings Is Not Warranted.

If the Court does not allow defendant's motion to dismiss herein, it should allow defendant's pending motion to vacate the stay of proceedings and enter judgment in accordance with the advisory opinion of the Interstate Commerce Commission.

Defendant maintains that the order of the Commission in Docket No. 32187 is not such an order as contemplated by the provisions of Sections 1336 and 1398 of Title 28, U. S. Code, or by the provisions of Section 17(9) of the Interstate Commerce Act, as amended (49 U.S.C. 17(9)).

The order does not require plaintiff to do anything or to refrain from doing anything. The action of the Commission is merely an ancillary step in the proceedings before this Court and serves to expedite the disposition of the suit before this Court. The Commission did not give effect to its findings by issuing an order requiring the payment of money or the performance of any act [fol. 47] by the parties. Its order of November 12, 1958, was merely a procedural step indicating that the docket was closed. Its order of March 4, 1959, was merely an order that denied plaintiff's request for reconsideration.

Defendant submits that plaintiff has misconstrued his remedy in seeking review of the Commission's action in a separate proceeding brought under the provisions of Title 28, U.S.C., Sections 1336 and 1398.

The jurisdiction conferred by Section 1336 extends to "any order of the Interstate Commerce Commission." Such

jurisdiction does not extend to mere findings and determinations in a Commission report. See: *United States* v. *Atlanta, Birmingham and Coast Ry. Co.*, 282 U.S. 522; *Shannahan* v. *United States*, 303 U.S. 596. It has also been held not applicable to all "orders" of the Commission because, as pointed out in *United States* v. *Griffin*, 303 U.S. 226, 233, practically every step taken by the Commission is preceded by the words "It is ordered." The Commission's determination in Docket No. 32187 is likened to that involved in *United States* v. *Los Angeles & Salt Lake R. Co.*, 273 U.S. 299. There, a suit was brought pursuant to the Urgent Deficiencies Act to set aside and annul the Commission's valuation of railroad property. In holding that the District Court lacked jurisdiction to review the valuation order, the Court said at pages 309-310:

> The final report on value, like the tentative report, is called an order. But there are many orders of the Commission which are not judicially reviewable [fol. 48] under the provisions of the Urgent Deficiencies Act. See *Procter & Gamble Co.* v. *United States*, 225 U.S. 282; *Hooker* v. *Knapp*, 225 U.S. 302; *Lehigh Valley RR. Co.* v. *United States*, 243 U.S. 413; *United States* v. *Illinois Central RR. Co.*, 244 U.S. 82, 89; *Delaware & Hudson Co.* v. *United States*, 266 U.S. 438.
>
> * * * * *
>
> The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, anything; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation. This so-called order is merely the formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the Commission, through its employees. * * * It was merely preparation for possible action in some proceeding which may be instituted in the future. * * *

Likewise, in the present suit, the Commission's action neither directs plaintiff to perform any action nor to refrain from the performance of any act. It does not affect plaintiff's status, rights or obligations as a carrier subject to regulation under the Interstate Commerce Act. It does not subject plaintiff to any threat of prosecution or other sanction. In other words, it is merely the exercise of the Commission's function of investigation resulting in findings that have application solely to the case pending in this Court.

[fol. 49] The Commission's determination in the case of *Frozen Food Express* v. *United States*, 351 U.S. 40, is wholly unlike the determination here. In that case, after an investigation and hearing instituted on its own motion, the Interstate Commerce Commission issued an order in which it was determined that certain specified commodities were not found to be "agricultural" within the meaning of Section 203(b)(6) of the Interstate Commerce Act (49 U.S.C. 303(b)(6)), which exempts motor vehicles used only in carrying "agricultural commodities" from certain provisions of the Interstate Commerce Act. The Commission's decision was in the form of a report and order. The order incorporated the "findings" and stated that the proceeding "be, and it is hereby, discontinued." The Supreme Court held that such order was reviewable under the provisions of the Urgent Deficiencies Act.

However, in so holding, the Court distinguished the case of *United States* v. *Los Angeles & Salt Lake R. Co.*, 273 U.S. 299. The Court stated on pages 43 and 44:

> • • • The determination by the Commission that a commodity is not an exempt agricultural product has an immediate and practical impact on carriers who are transporting the commodities, and on shippers as well. The "order" of the Commission warns every carrier, who does not have authority from the Commission to transport those commodities, that it does so at the risk of incurring criminal penalties. §222(a). Where unauthorized operations occur, the Commission may proceed administratively and issue a cease and [fol. 50] desist order. §204(c). Such orders of the Commission are enforceable by the courts. §222(b).

> And wilful violation of a cease and desist order is ground for revocation of a certificate or permit. §212. The determination made by the Commission is not therefore abstract, theoretical, or academic. Cf. *El Dorado Oil Works* v. *United States*, 328 U.S. 12, 18-19. The "order" of the Commission which classifies commodities as exempt or non-exempt is, indeed, the basis for carriers in ordering and arranging their affairs. * * *

Thus, it is clear that the order in the *Frozen Food Express* case is quite different from that in the present suit and that considered in the *United States* v. *Los Angeles & Salt Lake R. Co.* case, *supra*.

Conclusion

In view of the foregoing, it is clearly apparent that plaintiff's action in filing its petition in the United States District Court deprives this Court of any further jurisdiction in the present suit. It is clearly evident that the Commission's action in Docket No. 32187 is not one subject to review by a Federal District Court, but is subject to whatever weight this Court may determine in disposing of the present suit.

Therefore, defendant respectfully requests the Court to grant defendant's motion to dismiss. If the Court denies such motion, defendant then respectfully requests the Court to deny plaintiff's motion to stay proceedings herein. Defendant then further requests the Court to grant defen- [fol. 51] dant's prior motion to vacate its order of suspension and to enter judgment in accordance with the Interstate Commerce Commission's decision in Docket No. 32187.

Respectfully submitted,

George Cochran Doub, Assistant Attorney General, Civil Division.

Paris T. Houston, Lewis A. Dille, Attorneys, Civil Division, Department of Justice.

[fol. 52] EXHIBIT TO MOTION

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 26169

THE PENNSYLVANIA RAILROAD COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION

PETITION TO ENJOIN, SET ASIDE AND ANNUL AN ORDER OF THE INTERSTATE COMMERCE COMMISSION

I.

The petitioner, The Pennsylvania Railroad Company, brings this action against the Interstate Commerce Commission and United States of America to enjoin, set aside and annul a certain order made and issued by the Interstate Commerce Commission, Division 2 (hereinafter referred to as the Commission) on November 12, 1958, in a proceeding known as United States of America v. Pennsylvania Railroad Company, Docket No. 32187. Copies of the said order and the report made and issued by the Commission in that proceeding, which by the terms of the order is made a part thereof, are attached to this petition and made a part hereof by reference as Appendices A and B, respectively. Petitioner's request in that proceeding for reconsideration by the entire Commission of the decision of November 12, 1958, was denied by an order made and issued by the Commission on March 4, [fol. 53] 1959. A copy of such order is attached hereto and made a part hereof by reference as Appendix C.

II.

This action arises under, the United States is made a defendant herein, and the jurisdiction of this court rests on, the Act of June 25, 1948, c. 646, 62 Stat. 869, 931, 932, 28 U.S.C.A., Sections 1336, 1398, and Section 17(a) of the Interstate Commerce Act, 54 Stat. 799, 916, 49 U.S.C.A. Sec. 17(9).

III.

Petitioner is a corporation of the Commonwealth of Pennsylvania having its principal office in Philadelphia, Pennsylvania.

IV.

This proceeding involves the freight charges on certain carloads of iron and steel articles, steel ingots and billets shipped from origins in Ohio, Pennsylvania, West Virginia, and Maryland to New York, N. Y., during the years 1941 and 1942. The shipments were intended for export through the port of New York but were not exported through that port because of war conditions. Two sets of rates were in effect. One set was the export rates which could be assessed only when certain requirements set forth in a tariff filed with the Interstate Commerce Commission were met. The other set of rates was the domestic rates which were higher than the export rates and were applicable when the requirements of the export tariff were not met.

V.

The tariff requirements which were conditions precedent to the assessment of the export rates were not met in [fol. 54] connection with the shipments here involved and the domestic rates were assessed and collected. Later, upon the alleged authority of Section 322 of the Transportation Act of 1940 (54 Stat. 955, 49 U.S.C.A. Sec. 66), the United States deducted the difference between the domestic rates and the export rates from freight bills on subsequent shipments. The Railroad Company instituted suit before the United States Court of Claims to recover

that difference. Upon petition of the United States the Court of Claims suspended further proceedings before it "pending a determination by the Interstate Commerce Commission as to the proper charges to be applied to the shipments * * * ."

VI.

The matter came before the Commission in its Docket 32187 mentioned above, and the Commission in its report of November 12, 1958, after pointing out that the United States concedes that the domestic rates charged were applicable concluded that assessment of the domestic rates was reasonable in connection with certain of the shipments and unreasonable in connection with others; basing its conclusions solely upon whether or not due diligence was exhibited on behalf of the shippers to avoid non-compliance with the provisions of the export tariff.

VII.

The Commission entirely ignored its obligation to determine whether the rates were just and reasonable in and of themselves with regard to the service rendered.

VIII.

The Commission entirely ignored the fact that there is no evidence of record that the rates were unjust and [fol. 55] unreasonable in and of themselves with regard to the service rendered.

IX.

The Commission erred in that the level to which it found certain of the rates to have been unreasonable is lower than the level which the Commission had previously prescribed for transportation of the same commodities from and to the same points.

X.

The report and order of the Commission of November 12, 1958, (Appendices A and B) to the extent that they find that the rates charged on certain of the shipments

are unjust and unreasonable, are unlawful and void, and beyond the power of the Commission to make for the following reasons:

(a) In making said report and order the Commission failed to consider material evidence of record.

(b) The Commission misapplied the law.

(c) The conclusion that certain of the rates were unjust and unreasonable is not predicated upon any evidence or finding that said rates were unjust and unreasonable in and of themselves with regard to the transportation service rendered.

(d) The Commission has proceeded upon the assumption that power has been conferred upon it to determine that a rate is unjust and unreasonable because of the Commission's belief as to the equities of the situation.

(e) The Commission has concluded that the rates on certain of the shipments were unreasonable to a level which is lower than that which was prescribed by the Commission itself in an earlier proceeding.

[fol. 56] (f) The Commission failed to make the findings of the basic facts upon which it predicates its conclusion that charges on certain of the shipments were unjust and unreasonable.

(g) The findings of fact made by the Commission are not supported by evidence.

(h) The Commission's report and order are otherwise arbitrary, capricious, and without support in, and contrary to law and the evidence.

By reason of the arbitrary and capricious action and errors of law of the Commission in entering its order of November 12, 1958, petitioner is left without an adequate remedy at law and will be subject to irreparable damage if the relief herein prayed for is not granted.

WHEREFORE, your petitioner prays that:

1. On final hearing and submission of this case, the court adjudge and determine that the report and order of the Interstate Commerce Commission of November 12, 1958 (Appendices A and B) are unlawful, arbitrary, and capricious, without support in and contrary to law and the evidence; that a decree be entered appropriately enjoining, setting aside, and annulling the said order; that the matter be remanded to the Commission for further action not inconsistent with this court's decree;

[fol. 57] 2. This petitioner have such other and further relief in the premises as the nature of the case shall require and as to this court seems proper.

Respectfully submitted,

THE PENNSYLVANIA RAILROAD COMPANY

By its Attorney

/s/ William F. Zearfaus
William F. Zearfaus
1138 Transportation Center
Six Penn Center Plaza
Philadelphia 4, Pa.

Paul F. McArdle
Union Trust Building
Washington 5, D. C.
Of Counsel

April 3, 1959.

[fol. 59]

IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND REPLY TO THE DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION TO STAY PROCEEDINGS —Filed April 23, 1959

For the convenience of this Court, plaintiff is filing this single memorandum in opposition to defendant's motion to dismiss and in reply to the opposition filed by the defendant to plaintiff's motion to stay proceedings.

The cases cited by defendant in support of its motion to dismiss are without merit. Plaintiff filed its petition in this Court. The cases cited by defendant support the statutory authority as set forth in defendant's memorandum. However, in those cases, a complaint involving the same subject matter had been filed in a court prior to the filing of a petition in this Court. Plaintiff in this instance did not file any complaint in any Federal court prior to the filing of its petition in this Court.

Title 28 U.S.C.A., § 1336 provides:

[fol. 60] "Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

Title 28 U.S.C.A., § 1398 provides:

"Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action."

Plaintiff has no alternative but to follow the statutory authority to enforce, enjoin, set aside or annul such order.

The most recent expression of a case directly in point is *Davidson Transfer & Storage Co.* v. *United States*, 164 F. Supp. 571 (D. Md. 1958). In the *Davidson* suit, an original proceeding was filed in the United States District Court for the District of Columbia. Upon motion of the United States, the District Court action was stayed pending a reference and a determination of the reasonableness of the rates by the Interstate Commerce Commission. The Interstate Commerce Commission issued an order determining the issue of reasonablensss in aid of the pending court action and found that the rates were unreasonable. In compliance with the statutory authority, the plaintiff, Davidson Transfer & Storage Co., filed a complaint in the United States District Court for the District of Mary- [fol. 61] land. The United States, as a defendant, admitted jurisdiction of the District Court to review the action of the Interstate Commerce Commission. The Interstate Commerce Commission denied that the Federal court had jurisdiction, contending that the determination of the Interstate Commerce Commission is not an order within the meaning of any act authorizing separate suits in the Federal District Court. The opinion of the District Court rejected the argument raised by the Interstate Commerce Commission. It is interesting to note in this opinion that a reference is made to the jurisdiction of the United States Court of Claims. The opinion states, at page 574:

> "It appears that the Court of Claims has no jurisdiction to review orders of the Commission; . . ."

Plaintiff in this case finds itself in the position of attempting to have an order of the Interstate Commerce Commission reviewed. Since this Court does not have jurisdiction to review orders of the Interstate Commerce Commission, plaintiff is required to file a petition in compliance with the statutory authority. Since the principal office of the plaintiff is located in Philadelphia, Pennsylvania, such action has to be filed in the United States District Court for the Eastern District of Pennsylvania.

Defendant attacks in part the determination made by the Interstate Commerce Commission. Defendant suggests [fol. 62] that such determination is not an order of the

Interstate Commerce Commission. Attached to defendant's Motion to Vacate Suspension of Proceedings and For Judgment, filed March 23, 1959, are the orders issued by the Interstate Commerce Commission. These orders show on their face a full determination made by the Interstate Commerce Commission. These orders do not support defendant's contention that the determination of the Interstate Commerce Commission was in the nature of an advisory opinion to this Court.

Plaintiff requests that the action now pending in this Court be stayed until a determination of the petition now filed in the above-mentioned Federal court. Since plaintiff is to receive compensation in these proceedings, defendant cannot complain that it will be injured by any delay.

For the reasons set forth above, it is respectfully requested that the defendant's motion to dismiss be denied, and plaintiff's motion to stay the proceedings be granted.

Respectfully submitted,

Paul F. McArdle, 701 Union Trust Building, Washington 5, D. C., Attorney for Plaintiff.

[fol. 63]

IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

PLAINTIFF'S REPLY TO DEFENDANT'S MOTION TO VACATE SUSPENSION OF PROCEEDINGS AND FOR JUDGMENT—Filed May 27, 1959

By order of this Court dated May 13, 1959 plaintiff files this reply to defendant's motion to vacate suspension of proceedings and for judgment.

Plaintiff opposes the granting of defendant's motion for the following reasons:

1. There is pending in the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 26169, a petition filed by the plaintiff to enjoin, set aside and annul an order of the Interstate Commerce Commission.

2. Title 5 U.S.C.A., Section 1009 provides that any person suffering a legal wrong because of any agency action or adversely affected or aggrieved by such action shall be entitled to judicial review. Title 28 U.S.C.A., Section 1336 provides that a district court shall have jurisdiction [fol. 64] to enforce, enjoin, set aside and annul any order of the Interstate Commerce Commission.

3. If this Court should enter an order granting the defendant's motion such order would estop the plaintiff from asserting its claim for the reason that the statute of limitations would bar any further action.

4. Since the judgment is an award in favor of the plaintiff the defendant cannot complain of any injury by delay.

Argument No. 1

By an order of this Court dated April 3, 1957 the proceeding was referred to the Interstate Commerce Commission. The Interstate Commerce Commission assigned it Docket No. 32187 and set it down for hearing under its modified procedure. The parties submitted statements of fact and briefs, oral testimony was taken, the Examiner issued his proposed report, exceptions were filed to the proposed report and a report and order was issued by the Interstate Commerce Commission. This plaintiff filed a petition for reconsideration and on March 4, 1959 the Interstate Commerce Commission issued an order denying the petition for reconsideration and reaffirmed its original report and order dated November 12, 1958.

[fol. 65] In the report and order of the Interstate Commerce Commission dated November 12, 1958 the Commission found that the rates charged by this plaintiff were just and reasonable as to 13 shipments. In addition the Commission found that the rates charged on the remaining 62 shipments were unjust and unreasonable.

This plaintiff challenged the findings and order of the Commission insofar as they related to the 62 shipments. In order to attack the order of the Commission and in compliance with the applicable statutes, a petition was filed in the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 26169, in which the

Pennsylvania Railroad Company is the petitioner and United States of America and the Interstate Commerce Commission are the defendants. This petition requests that the order entered by the Interstate Commerce Commission be enjoined, set aside, and annulled.

If the District Court should find that the order of the Commission was in error then the plaintiff would be entitled to a further hearing before the Interstate Commerce Commission in compliance with the order of the District Court. The further hearing before the Interstate Com- [fol. 66] merce Commission may result in the finding that the rates on the 62 shipments in dispute were just and reasonable and enter an order in accordance with such findings. Such an order by the Commission would affect the total judgment entered by this Court. Until the District Court enters its order on the petition filed by the plaintiff, followed by a hearing at the Commission, it is premature for this Court to enter an order granting the defendant's motion.

Argument No. 2

The Administrative Procedure Act, Title 5 U.S.C.A., Section 1001, *et seq.* controls judicial review of an order of an administrative agency. Section 10 of this Act (Title 5, U.S.C.A., Section 1009) allows any person suffering a legal wrong because of any agency action, or adversely affected or aggrieved by such act, to judicial review. Every agency action made reviewable by statute shall be subject to judicial review.

Title 28, Section 1336 provides:

> "Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

[fol. 67] In order for the plaintiff to challenge the order of the Interstate Commerce Commission it must comply with the statutory requirements as set forth above. If this Court should enter an order granting the motion of the defendant it would in effect deny the plaintiff its statutory right of judicial review.

This Court does not have jurisdiction to review orders of the Interstate Commerce Commission. See *U.S.* v. *Jones*, 336 U.S. 641 (1948) and *Davidson Transfer and Storage Co.* v. *U.S.*, 164 F. Supp. 571 (D. Md. 1958).

Argument No. 3

As shown in Exhibit A attached to the petition filed in this Court the date of deduction, which controls the period of limitations, occurred during the years 1946 and 1947. This action was filed on February 7, 1951 within the statutory period of six years. If ordered by the District Court, the Commission on further hearing may determine that the rates on the disputed 62 shipments are just and reasonable. If this Court should enter an order granting the defendant's motion plaintiff would be estopped by the applicable period of limitation from filing its claim as to the disputed 62 shipments. Since the Commission [fol. 68] cannot award reparation the plaintiff would have no remedy in this Court, or in any other court or agency to collect its charges.

Argument No. 4

In the defendant's motion it is requested that judgment be entered for the plaintiff in the amount of $1,663.39 representing the rates found just and reasonable by the Commission on the 13 shipments. Since defendant would be required to pay the above amount it cannot complain that a delay in this proceeding would affect any possible recovery to it.

For the reasons set forth above it is respectfully requested that the defendant's motion to vacate the suspension of proceedings and enter judgment for plaintiff be denied. It is further requested that this court take no action until the District Court enters an order on the petition filed by this plaintiff.

Plaintiff requests oral argument.

Respectfully submitted,

Paul F. McArdle, 701 Union Trust Building, Washington 5, D.C., Attorney for Plaintiff.

[fol. 69]

IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

ORDER OF THE COURT GRANTING DEFENDANT'S MOTION TO VACATE SUSPENSION OF PROCEEDINGS AND ENTERING JUDGMENT—June 5, 1959

On April 3, 1957, further proceedings in this case were suspended and a referral to the Interstate Commerce Commission was ordered so that the Commission could make a determination "in aid of court litigation" as to the proper charges to be applied to the shipments involved in this suit, the court having found that this case warranted such a procedure. *United States* v. *The Western Pacific Railroad Co.*, 352 U.S. 59; *T.I.M.E. Inc.* v. *United States*, No. 68, October 1958 Term, Supreme Court, decided May 18, 1959.

On November 12, 1958, the Interstate Commerce Commission determined that as to certain shipments in issue the rates urged by the plaintiff were unjust and unreasonable, while as to others the rates were just and reasonable.

On March 23, 1959, the defendant on the basis of the Interstate Commerce Commission determination moved to vacate the suspension of proceedings and for judgment in accordance with the Interstate Commerce Commission determination which judgment would provide for recovery of $1,663.39 by plaintiff in satisfaction of all claims set forth in the petition. On May 27, 1959, plaintiff filed its opposition to this motion urging that proceedings here be continued in suspension pending a district court decision [fol. 70] on its petition to enjoin, set aside and annul the Interstate Commerce Commission determination made on referral by this court. Such a procedure we find inapplicable here. See cases cited, *supra*.

Now, Therefore, It Is Ordered this fifth day of June, 1959, that defendant's motion to vacate the suspension of proceedings be and the same is granted, and

It Is Further Ordered on the basis of the record made in this case, including the determination by the Interstate Commerce Commission, that judgment be and the same is entered for plaintiff in the sum of one thousand six hundred sixty-three dollars and thirty-nine cents ($1,663.39).

By the Court

Marvin Jones, Chief Judge.

[fol. 71] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 72]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—August 21, 1959

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 3, 1959.

Potter Stewart, Associate Justice of the Supreme Court of the United States.

Dated this 21st day of August, 1959.

[fol. 73]

SUPREME COURT OF THE UNITED STATES

No. 451, October Term, 1959

PENNSYLVANIA RAILROAD COMPANY, Petitioner,

vs.

UNITED STATES

ORDER ALLOWING CERTIORARI—December 14, 1959

The petition herein for a writ of certiorari to the United States Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.